Valley Camp Coal Company *and* United Mine Workers of America, Local 340-15A. Case 9-CA-15785

December 23, 1982

ORDER DENYING REQUEST FOR SPECIAL PERMISSION TO APPEAL

BY MEMBERS JENKINS, ZIMMERMAN, AND HUNTER

On October 22, 1980, the Regional Director for Region 9 of the National Labor Relations Board issued a complaint in the above-captioned case alleging that Respondent violated Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, by closing down its number 15(A) mine on or about August 15, 1980, resulting in the termination of 150 employees.

On June 8, 1981, at the request of counsel for the General Counsel, the Board issued a *subpoena ad testificandum* directing Johanna Maurice (herein called Petitioner), business editor of The Charleston Daily Mail, to appear and testify at the unfair labor practice hearing in connection with an article she had written which appeared in the Daily Mail on August 12, 1980. Section 102.31(b) of the Board's Rules and Regulations Series 8, as amended, provides that any person who receives a subpoena to appear at an NLRB hearing may, within 5 days of its service, petition the Board, or the administrative law judge conducting the hearing, to revoke the subpoena. Petitioner did not file a petition to revoke. Rather, on June 18, 1981, the day before the hearing, Petitioner filed with the District Court for the Southern District of West Virginia a complaint and motions for a temporary restraining order and a preliminary injunction seeking to enjoin the Board from enforcing the subpoena. On June 18, 1981, the district court granted a temporary restraining order and on July 13, 1981, a preliminary injunction restraining the Board from enforcing the subpoena. The Board appealed from the district court's order to the United States Court of Appeals for the Fourth Circuit. In its decision rendered on July 19, 1982, the court of appeals vacated the district court's injunction and remanded the case with instructions to dismiss because of Petitioner's failure to utilize available administrative remedies.

By telegram dated July 20, 1982, Petitioner petitioned Administrative Law Judge Peter E. Donnelly to revoke the subpoena. By telegram dated July 26, 1982, the General Counsel opposed the petition to revoke as untimely. On August 26, 1982, Petitioner filed a memorandum in support of her petition to revoke.

On September 15, 1982, Administrative Law Judge Donnelly issued an Order denying Petitioner's motion to revoke on grounds that filing of the district court complaint did not excuse Petitioner's failure to pursue relief under Section 102.31(b) of the Board's Rules and Regulations. By letter dated October 14, 1982, Petitioner filed a request for special permission to appeal from the ruling of the Administrative Law Judge. On October 20, 1982, Petitioner filed a memorandum in support of her request. On November 1, counsel for the General Counsel filed a memorandum in opposition to the request for special permission to appeal, and, on November 16, Petitioner filed a memorandum in response to the General Counsel's opposition.

In her appeal, Petitioner contends that (1) the 5-day statute of limitations was tolled when the district court issued a temporary restraining order enjoining the Board from enforcing the subpoena, thereby obviating the need "for administrative proceedings relating to the subpoena since the subpoena was no longer operative," (2) the General Counsel failed to follow the Department of Justice's guidelines (28 CFR §50.10) with respect to the service of subpoenas on media personnel, (3) the subpoena was invalid because it was served on Petitioner by mail, and not in person, and (4) the attempt to compel Petitioner to testify "substantially impinged Maurice's right to freedom of the press guaranteed by the First Amendment."

In connection with the latter, Petitioner contends that drawing reporters into litigation will lead the public to perceive them as "professional witnesses." Relying on Justice Powell's concurrence in *Branzburg* v. *Hayes*, 408 U.S. 665, 710 (1972), Petitioner argues that the "asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony." Petitioner alleges that since *Branzburg* the courts have acknowledged "a constitutionally based qualified privilege for journalists" and have balanced the competing interests in order to determine whether that privilege should obtain in particular cases. Petitioner urges the Board to strike the balance in favor of Petitioner because the General Counsel failed to make any efforts to obtain the information sought "from a non-media source." If, Petitioner further argues, the testimony sought by the General Counsel is for impeachment purposes, the General Counsel could have used Petitioner's article itself. Petitioner also contends that the information sought is peripheral to the heart of the Board's claim and that Petitioner is "unquestionably not competent to provide direct testimony as to

[Respondent's] reasons for shutting down mine 15(A)."

The Board having duly considered the matter, Petitioner's request for special permission to appeal is denied. As noted above, the Administrative Law Judge disposed of Petitioner's motion to revoke on procedural grounds; i.e., that it was not filed within 5 days of service of the subpoena as provided for under Section 102.31(b) of the Board's Rules and Regulations. We agree. However, we also believe Petitioner's appeal should be denied on the merits.

In contending that compliance with the subpoena will impinge on the Constitution's guarantee of a free press, Petitioner relies, *inter alia*, on the Supreme Court's decision in *Branzburg* v. *Hayes, supra*. As framed by the Supreme Court, the issue in *Branzburg* was whether requiring newsmen to appear and testify before state or Federal grand juries abridges the freedom of speech and press guaranteed by the first amendment. Petitioner contends that the balancing approach set forth in Justice Powell's concurrence requires us to grant her motion to revoke the subpoena. We note, however, that the Supreme Court expressly declined to create another testimonial privilege similar to the fifth amendment's self-incrimination privilege. As the Court observed, there is no basis for holding that "public interest in law enforcement . . . is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them." In short, members of the news gathering media have no absolute privilege not to appear and testify in a judicial proceeding. The situation here does not involve a confidential source of information which a reporter is trying to protect. Indeed, as all concerned acknowledge, Respondent's representative, Howe, is the news source on which Petitioner relied and, since the evidence is clearly relevant, counsel for the General Counsel is entitled to elicit from Petitioner testimony with respect to Howe's statements explaining his decision to close the mine. Contrary to Petitioner, there is no non-media source from which the information sought could be obtained and, since Howe denied certain statements attributed to him by Petitioner, the General Counsel could not, for impeachment purposes, rely on Petitioner's article itself.[1] Thus, Petitioner asserts only a generalized claim of privilege and fails to articulate any specific injury that we should balance, even if we accepted Petitioner's characterization of the applicable legal test. Accordingly,

It is hereby ordered that Petitioner's request for special permission to appeal the Administrative Law Judge's Order denying Petitioner's motion to revoke be denied.

IT IS FURTHER ORDERED that this matter be remanded to the Regional Director for further appropriate action.

[1] We also reject as lacking in merit Petitioner's other procedural arguments. Under Sec. 11(1) and (2) of the Act, the Board has sole authority to issue and revoke subpoenas in Board proceedings and to determine whether to seek enforcement of its subpoenas, and the Board is clearly not bound by the Attorney General's internal guidelines which purport to establish policy for Justice Department personnel for issuing subpoenas to media personnel. Similarly, the Act specifically provides for service of subpoenas by mail and satisfies the requirement of due process. *N.L.R.B.* v. *Strickland, et al.*, 321 F.2d 811 (6th Cir. 1963). Even if the Attorney General's guidelines were applicable, we would deny Petitioner's appeal. Petitioner does not suggest that alternative sources exist for the information that would be obtained from her testimony. It appears that the information relates directly to issues raised in the case and is not speculative.